

Washington D.C. (March 30, 2009) – In letters to Federal officials involved in the merger of Merrill Lynch and Bank of America, Congressman Dennis J. Kucinich, Chairman of the Domestic Policy Subcommittee of the House Oversight and Government Reform Committee, requested documents about their knowledge of \$3.62 billion in bonuses Merrill Lynch paid top executives at the company just weeks before \$25 billion in Federal aid was given to Bank of America for the merger.

The Merrill bonuses were 22 times the size of the bonuses AIG awarded. They also constituted a significant share (36.2%) of TARP funds allocated to Merrill. Furthermore, they were not locked in by preexisting contract and were performance bonuses, as opposed to retention bonuses. Also unusual, the Merrill Lynch Compensation Committee awarded these payments on December 8, 2008, before the end of the fourth quarter, in which Merrill lost more than \$15 billion, and after Merrill was informed that it would be allocated \$10 billion in TARP funds.

These payments raise significant questions about what information Merrill Lynch and Bank of America executives shared with federal officials that oversaw the Merrill acquisition by Bank of America. Ordinary shareholders were unaware of the details of the bonus payments, but the U.S. government held 800,000 shares in preferred stock and warrants at the time and federal officials regularly met with both Bank of America and Merrill Lynch executives.

Congressman Kucinich sent a similar letters to Mr. Ken Lewis, CEO of Bank of America, Mr. Ben Bernanke, Chairman of the Federal Reserve, and Mr. Neel Kashkari, Interim Assistant Director of Financial Stability. In the letter, Kucinich requests all documents and communications between employees of Bank of America and Treasury and/or the Federal Reserve, and Merrill Lynch and Treasury and/or the Federal Reserve, related in any way to Merrill's compensation packages, bonuses, and/or Bank of America's receipt of TARP monies.

The full text of the letter to Mr. Bernanke follows:

March 30, 2009

Mr. Ben S. Bernanke

Chairman
Board of Governors of the Federal Reserve System
Twentieth St. and Constitution Ave. N.W.
Washington, D.C. 20551

Dear Mr. Bernanke:

As you know, Merrill Lynch & Co. ("Merrill") paid out several billion dollars of bonuses in December 2008, before their merger with Bank of America Corporation (BOA) was consummated but after Treasury allocated \$10 billion in Troubled Assets Relief Program (TARP) funds to Merrill and after Treasury's initial injection of \$15 billion in BOA. In contrast to the bonuses awarded by AIG, the Merrill bonuses constituted a significant proportion of allocated TARP funds, were not locked into place by preexisting contract, and were performance, not retention, in nature. They also raise significant questions about what you and other Federal Reserve officials involved in the merger of BOA and Merrill knew about the Merrill bonuses.

The Merrill bonuses were 22 times larger than those paid by AIG (\$3,620 million versus \$165 million). They were also very large relative to the TARP monies allocated to Merrill. The Merrill bonuses were the equivalent of 36.2% of TARP monies Treasury allocated to Merrill and awarded to BOA after their merger. The bonuses, awarded mostly as cash, were made only to top management at Merrill. To be eligible for the bonuses, Merrill employees had to have a salary of at least \$300,000 and attained the title of Vice President or higher.¹

The Merrill bonuses were determined by Merrill's Compensation Committee at its meeting of December 8, 2008, shortly after BOA shareholders approved the merger but before financial results for the Fourth Quarter had been determined.² This appears to be a departure from normal company practice, since the type of bonus Merrill awarded was a performance bonus that, according to company policy, was supposed to reflect all four quarters of performance and was paid in January or later.³ In this case, however, the bonuses were awarded in December before Fourth Quarter performance had been determined.

Shortly after the award of the Merrill bonuses, Merrill/BOA determined that the losses for Fourth Quarter performance at Merrill were enormous.⁴ By January, BOA would announce Fourth Quarter losses at Merrill in excess of \$15 billion.

BOA had knowledge of and influence over Merrill's intent to pay out bonuses even before BOA took control of Merrill. According to the merger agreement of September 15, 2008, Merrill's bonus awards were to be made "in consultation with [Bank of America]."⁵ In an undisclosed attachment to the merger agreement, made public only recently by the Attorney General of New York State, Bank of America permitted Merrill the right to award up to \$5.8 billion for calendar year 2008 performance⁶ (See Merger Agreement Attachment, attached hereto).

While prior to the merger BOA knew of Merrill's intent to award billions of dollars in performance bonuses before the Fourth Quarter earnings were calculated, BOA did not disclose the details it possessed about the Merrill bonuses and the unusualness of the timing of those bonuses to its shareholders prior to their vote on the merger.⁷

This raises important questions about what you knew about the Merrill bonuses, and what you did with your knowledge. If ordinary BOA shareholders were ignorant of the details of the Merrill bonus arrangement, was the U.S. government as well? At the time, the U.S. held 800,000 shares in preferred stock and warrants in BOA. Unlike ordinary shareholders, you and then-Secretary Henry Paulson met on at least several occasions with Ken Lewis of BOA in late 2008. For instance, on December 17, 2008 and again on December 19, 2008, BOA CEO Ken Lewis met with you to explore withdrawing from the deal to acquire Merrill. However, you and Mr. Paulson reportedly impressed upon Mr. Lewis the importance of upholding his commitment to the deal. Additionally, Treasury released in the following month another \$20 billion in TARP funds to BOA and guaranteed \$118 billion in troubled assets against loss. ⁸

In order to assist the Subcommittee with its investigation into what you knew about the Merrill bonuses, when you knew it, and what you did with your knowledge, I hereby request the following documents:

1) All documents and communications between employees of Bank of America and the Federal Reserve, and Merrill Lynch and the Federal Reserve, related in any way to Merrill's compensation packages, bonuses, and/or Bank of America's receipt of TARP monies, for the period from August 1, 2008 through January 19, 2009.

The answers the Subcommittee seeks will be of interest to the American public, who are rightly concerned about how recipient firms have used TARP monies, and how well the Federal Government has monitored the use of those funds and safeguarded them from waste and abuse.⁹ The Oversight and Government Reform Committee is the principal oversight committee in the House of Representatives and has broad oversight jurisdiction as set forth in House Rule X. An attachment to this letter provides information on how to respond to the

Subcommittee's request.

Sincerely,

Dennis J. Kucinich

Chairman
Domestic Policy Subcommittee

Enclosure

cc: Jim Jordan
Ranking Minority Member

1. See Merrill Lynch & Co., Inc. 2007 Deferred Compensation Plan For A Select Group of Eligible Employees, Form 10-K (2006) at 5.

2. Attorney General's Memorandum in Opposition to Motion to Intervene and Petition to Quash or Modify Subpoena ("AG Opp. Mem.") at 6, *Cuomo v. Thain*, No. 400381/09, (N.Y. Sup. Ct. Mar. 11, 2009).

3. Merrill *supra* note 1 at 4. The Merrill bonuses were awarded pursuant to its Variable Incentive Compensation Program. Merrill defined the program thus: "'Variable Incentive Compensation' means the variable incentive compensation or office manager incentive compensation that is paid in cash to certain employees of the Company generally in January or February of the Plan Year with respect to the prior Fiscal Year."

4. AG Opp. Mem. *supra* note 2 at 4.

5. Id. at 6: “When it learned that Merrill’s CEO John Thain was persistently seeking an eight-figure bonus, Bank of America informed Thain that its Board of Directors would strongly disapprove of that bonus. Following that threat, Thain withdrew his request for a bonus. In contrast, no similar threats were made when Bank of America learned about Merrill’s intention to accelerate its bonus payments for other top executives.”

6. Id at 5.

7. Id at 4.

8. Dan Fitzpatrick, Susanne Craig and Deborah Solomon, In Merrill Deal, U.S. Played Hardball, WALL STREET JOURNAL, (Feb. 5, 2009). According to SIGTARP, Treasury’s support for BOA included \$15 billion on October 27, 2008, an additional \$10 billion on January 9, 2009, and an additional \$20 billion on January 16, 2009. On the same day, Treasury, along with the FDIC and Federal Reserve, announced intent to provide BOA with another \$118 billion in loss protection, according to the Office of the Special Inspector General for the Troubled Asset Relief Program, Initial Report to the Congress (Feb. 6, 2009) at 70.

9. While the Merrill bonuses were paid by Merrill before any TARP monies arrived, it is also arguably true that Merrill was not in a sustainable financial position to award such bonuses without the considerable amount of U.S. taxpayer funds committed to Merrill and BOA. Merrill was, after all, at risk of declaring bankruptcy in the fall of 2008. It was that eventuality that Treasury and the Federal Reserve were trying to stave off through engineering the merger of Merrill with BOA. Ultimately, BOA would receive \$45 billion in TARP funds, and \$118 billion in loss protection from toxic assets it had acquired independently and through the acquisition of Merrill. TARP funds therefore could have had a decisive effect in funding the bonuses, by means of subsidizing BOA’s acquisition of Merrill’s substantial liabilities, thus keeping Merrill out of bankruptcy.

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